

# The EU 11th and 12th Packages of Sanctions Against Russia: How Far is the EU Willing to Go Extraterritorially?

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*The adoption, on 21 June 2023, of the eleventh package of sanctions in response to Russia's on-going military aggression against Ukraine marks an important milestone in the EU sanctions' practice. These measures, further strengthened by the adoption of the twelfth package of sanctions on 18 December 2023, aim to effectively prevent and combat the circumvention of existing trade sanctions, potentially extending the extraterritorial reach of European sanctions. This article aims to analyse the extent to which this application of extraterritoriality, targeting entities beyond the EU's jurisdiction, may raise concerns regarding the EU's compliance with established rules and limitations under international law regarding prescriptive jurisdiction. Firstly, the article provides an overview of the background and content of these new measures, as well as their relationship with the EU's sanctions regime imposed on Russia since February 2022. Subsequently, it examines the issue of the extraterritorial application of the new 'anti-circumvention rules' and the extent to which the EU has gradually embraced a broader (or 'hard') understanding of extraterritoriality within the domain of sanctions. It is noteworthy to consider the surprising nature of this development, as the EU has consistently expressed opposition to similar measures when implemented by the US.*

**Keywords:** unilateral sanctions, EU, Russia, extraterritorial application, secondary sanctions, export control, designation criteria, aggression, jus cogens

## I INTRODUCTION

On 21 June 2023, after months of intense debates, the European Union (EU) finally agreed on an eleventh package of sanctions (which the EU usually refers to as 'restrictive measures') in response to Russia's ongoing military aggression against Ukraine.<sup>1</sup> The relevant legal acts – Regulations No 1214 and No 1215, Decisions No 1217 and No 1218 – were published on 23 June 2023, and came into effect the following day.<sup>2</sup> These measures not only introduce new bans on previously unsanctioned Russian products and sectors but also focus on effectively preventing and combating the circumvention of existing EU sanctions by third countries and within third countries.<sup>3</sup> To achieve these goals, the

measures employ four different avenues: new trade restrictions, new designations, new transport measures, and the establishment of the legal grounds for a new anti-circumvention tool. Additional measures have been adopted concerning disinformation and the energy sector, although they are not directly related to preventing circumvention and will not be discussed in this article.<sup>4</sup>

Section 2 provides a brief overview of the background and content of the measures introduced by the eleventh package, as well as their relationship with the EU's sanctions regime imposed on Russia since February 2022. This section also touches upon the supplementary anti-circumvention measures implemented in the twelfth package, which was adopted on 18 December 2023,<sup>5</sup> and the additional listings included in the thirteenth package of

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<sup>1</sup> See the announcement by the Swedish Presidency of the EU Council, <https://twitter.com/sweden2023eu/status/1671501823084052486> (all website visited 6 Mar. 2024).

<sup>2</sup> Council Regulation (EU) 2023/1214 of 23 June 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2023] OJ L 159 I; and Council Regulation (EU) 2023/1215 of 23 June 2023 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ L 159 I. These two regulations are based, respectively, on Council Decision (CFSP) 2023/1217 of 23 June 2023 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2023] OJ L 159, and on Council Decision (CFSP) 2023/1218 of 23 June 2023 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2023] OJ L 159 I.

<sup>3</sup> Decision 2023/1217, *supra* n. 2, Recital 3.

<sup>4</sup> *Ibid.*, Recitals 23–26 and 34–36.

<sup>5</sup> Council Regulation (EU) 2023/2878 of 18 December 2023 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2023] OJ L 2023/2878.

sanctions, adopted on 23 February 2023, as they specifically address the issue of circumvention.<sup>6</sup> In section 3, the article delves into the topic of extraterritoriality. The new anti-circumvention rules represent a novel aspect in the EU's sanctions practice and could result in the first extraterritorial reach of European sanctions. The extent to which this use of extraterritoriality – that is, the application of sanctions on entities that fall strictly outside the EU jurisdiction – will result in the EU violating existing rules and limits under international law of jurisdiction is, however, still far from clear. The article aims to shed light on this sensitive issue, and concludes with section 4, offering some final observations.

## 2 THE MEASURES ADOPTED

Circumvention of sanctions can be defined as any action taken by States or private entities with the intention or effect of frustrating the goals of sanctions. Since circumvention undermines the effectiveness of sanctions, most sanctions regimes include provisions aimed at prohibiting such practices. For example, Article 12 of Regulation 833/2014, which addresses the restrictive measures applied in response to Russia's destabilizing actions in Ukraine, states that it is 'prohibited to participate, knowingly and intentionally, in activities with the object or effect of circumventing the prohibitions [set out in this Regulation]'.<sup>7</sup> The EU Court of Justice, in its judgment in *Afrasiabi*, provided a broad interpretation of circumvention, describing it as 'activities which have the aim or result of enabling their author to avoid the application' of EU measures.<sup>8</sup> The Court clarified that circumvention includes not only direct and intentional acts but also situations where a person 'is at least aware' that 'its participation may have that object or that effect, and accepts that possibility'.<sup>9</sup>

The EU Commission has recently supported the Court of Justice's broad approach to circumvention. In its Consolidated Frequently Asked Questions (FAQs) on the implementation of Russian-related sanctions, the Commission explains that 'the threshold [of

circumvention] is acting with knowledge and intent to circumvent a prohibition included in the Regulations'.<sup>10</sup> For instance, '[i]f a certain structure was created in order to assist a person to evade the effects of its possible future listing, then current, on-going participation in that structure can amount to circumvention of the restrictive measures, if done knowingly and intentionally'.<sup>11</sup>

The set of restrictive measures adopted in response to the war in Ukraine since February 2022 has proven to be particularly vulnerable to circumvention strategies. Russia has managed to find third-party actors willing to assist in circumventing sanctions, primarily by increasing their trade with Russia.<sup>12</sup> The price cap and import ban on Russian crude oil, for instance, have been exploited for circumvention, with countries importing larger volumes of Russian oil and exporting growing volumes of refined products derived from it, including to the EU, which has prohibited the import of these products and the oil from which they are produced.<sup>13</sup> Another challenge to the effectiveness of sanctions arises from EU citizens who exploit loopholes or weaknesses in the EU sanctions framework to maintain commercial relationships with Russian sanctioned parties through intermediaries.

The widespread and successful circumvention practices that undermine the effectiveness of the EU Russian-related sanctions have exposed the fragility of typical anti-circumvention provisions. Consequently, the EU has undertaken several significant initiatives over the past year and a half to address the legal gaps and loopholes that can be exploited for circumvention and to enhance the effectiveness of such measures.<sup>14</sup> Notably, these include the proposal of a new 'EU crime' that would classify the violation of EU restrictive measures as a criminal offense within the scope of Article 83(1) TFEU, followed by the proposal for a directive to harmonize the definitions and penalties for violation of sanctions.<sup>15</sup>

The measures adopted under the eleventh and twelfth packages complete that strategy, by focusing instead on circumvention practices committed in and by third countries that fall outside the potential jurisdiction of the EU.

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<sup>6</sup> Council Regulation (EU) 2024/745 of 23 February 2024 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2024] OJ L 2024/745.

<sup>7</sup> Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L 229.

<sup>8</sup> Case C-72/11, *Afrasiabi and others*, EU:C:2011:874, para. 60.

<sup>9</sup> *Ibid.*, para. 68.

<sup>10</sup> Commission Consolidated FAQs on the implementation of Council Regulation 833/2014 and Council Regulation 269/2014 (Last update 2 Oct. 2023), at 16.

<sup>11</sup> *Ibid.*, at 32.

<sup>12</sup> See Svitlana Taran, *Strengthening the Impact of EU Sanctions Against Russian Aggression in Ukraine*, EPC Discussion paper 7 (27 Oct. 2022), [https://www.epc.eu/content/PDF/2022/Strengthening\\_the\\_impact\\_of\\_EU\\_sanctions\\_DP.pdf](https://www.epc.eu/content/PDF/2022/Strengthening_the_impact_of_EU_sanctions_DP.pdf).

<sup>13</sup> EEAS, *Some Clarifications on the Circumvention of EU Sanctions Against Russia* (19 May 2023), [https://www.eeas.europa.eu/eeas/some-clarifications-circumvention-eu-sanctions-against-russia\\_en](https://www.eeas.europa.eu/eeas/some-clarifications-circumvention-eu-sanctions-against-russia_en).

<sup>14</sup> See on this, Francesca Finelli, *Countering Circumvention of Restrictive Measures: the EU Response*, 60(3) CML Rev. 733–762 (2023), doi: 10.54648/COLA2023050.

<sup>15</sup> See respectively, COM(2022)247 final, Proposal for a Council Decision; and Council COM(2022)684 final, Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures.

In doing so, these measures incorporate extraterritorial provisions aimed at curbing or even prohibiting transaction that undermine sanctions but remain entirely legal in third-party States.<sup>16</sup>

## 2.1 Import and Export Restrictions

In the pursuit of preventing circumvention of sanctions, the EU has implemented additional import and export restrictions. Notably, over 140 companies have been newly added to the list of entities directly supporting Russia's military and industrial complex in its aggression against Ukraine under the eleventh, twelfth, and thirteenth packages of sanctions.<sup>17</sup> Of particular significance is the inclusion, for the first time, of entities located in third countries – such as Uzbekistan, China, China (Hong Kong), United Arab Emirates, Syria, Armenia, Türkiye, India, Thailand, and others – because they have been implicated in the circumvention of trade restrictions.

As a means to minimize the risk of circumvention of already existing import restrictions on iron and steel goods, introduced by the eighth package (and effective as of 30 September 2023), the eleventh package requires importers to prove that the inputs used in processing steel and iron in a third country do not come from Russia.<sup>18</sup> The same package also introduced a new set of measures which seek to prevent EU companies from selling, licensing or transferring in any other way their industrial know-how and trade secrets concerning sanctioned goods to third country companies, which would then manufacture those products in, or provide them to, Russia.<sup>19</sup>

Finally, as part of the twelfth package, a prohibition on the importation of diamonds originating from Russia has been implemented. This ban extends to diamonds exported from Russia and, in order to effectively deprive Russia of revenues derived from diamond mining, it also encompasses diamonds passing through Russia and Russian diamonds processed in third countries outside of Russia.<sup>20</sup>

## 2.2 Additional Listings and Freezing of Assets

The majority of newly designated individuals and entities subjected to asset freezes have been identified based on the established criteria outlined in Council Decision 2014/145 of 17 March 2014, as subsequently amended.<sup>21</sup> However, Decision 2023/1218 introduced an additional ground for listing individuals for 'otherwise significantly frustrating' the EU sanctions.<sup>22</sup> The Council has clarified that such actions may include, among others: the primary activity of a third-country operator involving the purchase of restricted goods in the EU that ultimately reach Russia; involvement of Russian individuals or entities at any stage; recent establishment of a company for purposes related to the transportation of restricted goods to Russia; or a substantial increase in turnover for a third-country operator engaged in such activities. Furthermore, the same decision reaffirms that 'facilitating infringements of the prohibition against circumvention' of EU sanctions serves as a basis for listing.<sup>23</sup>

## 2.3 Transport Measures

Decision 2023/1217 extends the prohibition on the transportation of goods within the EU using trailers and semi-trailers registered in Russia, even when towed by trucks registered outside of Russia. The accompanying explanatory note from the Commission emphasizes that this provision aims to crack down on the circumvention of the prohibition on Russian freight road operators carrying goods within the EU.<sup>24</sup>

In a similar vein, the eleventh package addresses the issue of 'shadow fleets', that is the increase of deceptive practices by vessels transporting Russian crude oil and petroleum products, which refers to deceptive practices employed by vessels transporting Russian crude oil and petroleum products to conceal their origin and evade import bans and price caps on transportation and services to third countries. Decision 2023/1217 introduces a prohibition on vessels accessing EU ports and locks if a

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<sup>16</sup> See Bryan R. Early, *Confronting the Implementation and Enforcement Challenges Involved in Imposing Economic Sanctions*, in *Coercive Diplomacy, Sanctions and International Law* 43–69 (Natalino Ronzitti ed., Brill Nijhoff 2016).

<sup>17</sup> The reference is to the list set out in Annex IV to Decision 2014/512/CFSP.

<sup>18</sup> Council Regulation 2023/1214, *supra* n. 2, Art. 1, para. 12.

<sup>19</sup> *Ibid.*, Art. 1.

<sup>20</sup> Council Regulation 2023/2878, *supra* n. 5, Art. 1, para. 15, introducing a new Art. 3(p) to Regulation 2014/833.

<sup>21</sup> Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L 78/16. After the last round of designations under the Thirteenth package of sanctions, EU restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine now apply to over 2000 individuals and entities altogether.

<sup>22</sup> Decision 2023/1218, *supra* n. 2, Art. 1. See as an example, Council Implementing Regulation (EU) 2024/753 of 22 February 2024 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2024] OJ L 2024/753, where a Russian logistics company and its director have been listed due to their involvement in parallel imports of goods to Russia that are subject to EU restrictive measures. This action is considered to 'significantly frustrate' the provisions outlined in Decision 2014/512 and Regulation 833/2014.

<sup>23</sup> Decision 2014/145, *supra* n. 21, Art. 2(h).

<sup>24</sup> See Press Release, *EU adopts 11th Package of Sanctions Against Russia for Its Continued Illegal War Against Ukraine* (23 Jun. 2023), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_3429](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_3429).

Member State's competent authority 'has reasonable cause to suspect' that the vessel is in breach of the ban on importing seaborne Russian crude oil and petroleum products into the EU, or it is transporting Russian crude oil or petroleum products purchased above the agreed price cap. To be granted access to EU ports, vessels must notify a Member State's competent authority of any ship-to-ship transfer occurring within the Exclusive Economic Zone of a Member State or within twelve nautical miles from the baseline of that Member State's coast at least 48 hours in advance.<sup>25</sup> The prohibition on accessing EU ports and locks also applies to vessels transporting Russian crude oil if competent authorities have reasonable cause to suspect that their automatic identification systems (AIS) were deactivated during the voyage to a Member State.<sup>26</sup> As a part of the on-going effort to combat the use of 'shadow fleet' by Russia to circumvent the price oil cap, the twelfth package strengthens due diligence and information disclosure requirements for entities involved in oil and oil products shipping and services.<sup>27</sup>

#### 2.4 The new 'Anti-circumvention Tool': Substantial and Procedural Requirements

The eleventh package of sanctions has provided the legal grounds for a new mechanism – the so-called 'anti-circumvention tool' – which aims to prevent the circumvention of sanctions. This tool empowers the EU to impose export bans on entire third countries engaged in trade involving goods that can be used for civilian and military purposes as well as those that contribute to Russia's military and technological enhancement. As stated by the EU Commission, this tool will be utilized as 'an exceptional and last resort measure when other individual measures and outreach by the EU to concerned

third countries have been insufficient to prevent circumvention'.<sup>28</sup>

Deliberately, the activation of the anti-circumvention tool is subject to stringent procedural and substantive requirements,<sup>29</sup> which primarily position it as a deterrent rather than a coercive instrument. Similarities can be drawn, for example, to measures employed by States to target companies seeking to evade trade defence duties, such as anti-dumping or countervailing duties, on their exports.<sup>30</sup>

Decisions regarding the inclusion of specific countries or sensitive dual-use goods and technology within the scope of the prohibition are yet to be made.<sup>31</sup> These determinations will be made by the Council based on proposals put forth by the High Representative of the Union for Foreign Affairs and Security Policy and the Commission.<sup>32</sup> The procedure also gives the concerned third country the right to be consulted and to provide its view.<sup>33</sup> Only after the conclusion of the final engagement with said third country can the Council, acting unanimously, decide on the listing of the third country and the relevant goods or technologies.<sup>34</sup>

While the new anti-circumvention tool may potentially infringe upon certain international obligations of the EU towards specific third states, such as those under international trade law, the wrongful nature of such conduct should be precluded. This is because it is undertaken in response to an internationally wrongful act committed by these States and aims to encourage their compliance with their international obligations. As discussed further in the subsequent section, the legal grounds of such qualification is based on the premise that the EU considers the effective implementation of its restrictive measures against Russia as a matter vital to its essential domestic interests. Therefore, any attempts at circumvention by third countries should be deemed wrongful acts, and subsequent reactions should be considered lawful

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<sup>25</sup> Decision 2023/1217, *supra* n. 2, Recitals 29–33, and Art. 1, para. 13.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, Art. 1, para. 15.

<sup>28</sup> Press Release, *supra* n. 24.

<sup>29</sup> See Council Decision 2023/1217, *supra* n. 2, Art. 1, para. 23. The procedure to resort to the anti-circumvention tool entails a three-step requirement. Initially, the EU should engage in diplomatic endeavours with relevant third countries to deter circumvention. Only when these bilateral and multilateral cooperation efforts fail to produce the desired outcomes can the EU implement targeted individual measures that address the involvement of specific third-country operators in facilitating circumvention. Finally, if, despite the adoption of such individual measures and continued engagement with the third country, it becomes evident that the on-going circumvention persists due to its significant scale, nature, or systemic nature, the EU should have the ability to activate the application of the new tool.

<sup>30</sup> See for instance, Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L 176.

<sup>31</sup> Yet the Commission has published, though informally via its website, two lists of goods and technologies at high risk of circumvention. The first list on 'Economically Critical Goods' is comprised of mainly industrial goods subject to EU's restrictive measures for which anomalous trade flows via certain third countries to Russia have been detected. See at, [https://finance.ec.europa.eu/document/download/ed41eea6-8d13-4963-ad80-38a8d4f94b78\\_en?filename=230623-list-economically-critical-goods\\_en.pdf](https://finance.ec.europa.eu/document/download/ed41eea6-8d13-4963-ad80-38a8d4f94b78_en?filename=230623-list-economically-critical-goods_en.pdf). The second list, which has been prepared in coordination with the US, the UK and Japan, identifies a number of prohibited dual-use goods and advanced technology items that are used in Russian military systems found on the battlefield in Ukraine or that are critical to the development, production or use of those Russian military systems. This list has been revised and updated on 22 Feb. 2024. See at, [https://finance.ec.europa.eu/document/download/5a2494db-d874-4e2b-bf2a-ec5a191d2dc0\\_en?filename=list-common-high-priority-items\\_en.pdf](https://finance.ec.europa.eu/document/download/5a2494db-d874-4e2b-bf2a-ec5a191d2dc0_en?filename=list-common-high-priority-items_en.pdf).

<sup>32</sup> The proposal should include a technical analysis by the Commission on the circumvention issues in question, as well as available trade data demonstrating that the alternative measures taken have been ineffective and information about the efforts carried out by the EU to address the matter with the third country in question.

<sup>33</sup> European Commission, *Questions and Answers on the 11th Package of Restrictive Measures Against Russia* (23 Jun. 2023), [https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_23\\_3449](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_23_3449).

<sup>34</sup> One should also note that, before goods may be listed, their export must otherwise be prohibited under Regulation 833/2014. This means that if a carve-out or derogation applies in respect of the trade sanction, it will also apply in respect of the anti-circumvention sanction.



countermeasures in accordance with the International Law Commission (ILC)'s Project of articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) 2001.

## 2.5 The 'No-Russia' Contractual Clause and other Measures under the 12th Package of Sanctions to Strengthen the Fighting Against Circumvention

Regulation 2023/2878 introduced a new 'No-Russia' (or 'no re-export to Russia') contractual clause,<sup>35</sup> which requires exporters to include contractual provisions prohibiting their costumers from re-exporting certain particularly sensitive goods and technologies to Russia or for use in Russia. Specifically, under the new Article 12(g) of Regulation 833/2014, effective from 20 March 2024, exporters are obligated to prohibit, through contractual agreements – prior to or at the latest at the time of the export, sale, supply or transfer of the relevant goods to a third country – the re-exportation to Russia and the use in Russia of goods or technologies listed in Annexes XI, XX, and XXXV, as well as common military items listed in Annex XL of Regulation no. 833/2014, and firearms and ammunition listed in Annex I of Regulation no. 258/2012. The contractual agreement with the counterparty in the third country must also include appropriate remedies in the event of a breach of the aforementioned prohibition. Additionally, if counterparty from a third country violates such contractual obligations, exporters must promptly notify the competent authority of the EU Member State in which they reside or are established.<sup>36</sup>

The introduction of the 'No-Russia' clause has sparked controversial regarding its practical implementation, primarily due to the broad proposed wording. To address the concerns surrounding this clause, the Commission published a FAQs document on 22 February 2024, just before the adoption of the thirteenth package of sanction. The FAQ aims to clarify the purpose and specific language of Article 12(g). According to the Commission's FAQ, the 'No-Russia' clause is limited to contracts involving the export of goods from the EU to third countries and does not apply, for instance, to non-European supply relationships governed by Regulation 833/2014. The FAQs also provides a draft clause, which can be considered as

fulfilling the obligation, along with guidance on how to enforce this obligation, its application to existing contracts, and the interpretation of the term 'adequate remedies'.<sup>37</sup>

Regulation 2023/2878 introduces other significant anti-circumvention measure, such as a ban on Russian nationals from owning, controlling or holding positions within the governing bodies of legal entities, organizations, or bodies that offer crypto-asset wallet, account, or custody services to individuals and residents of Russia<sup>38</sup>; and a new communication requirement mandating EU entities, directly or indirectly owned by Russian nationals or persons residing in Russia, or Russian-established entities with a stake of over 40%, to notify transfers of funds exceeding EUR 100,000 from the EU.<sup>39</sup> The commitment to robust anti-circumvention measures is further exemplified by the recently released guidance by the Commission, which considers the sale of shares in a Russian subsidiary that holds certain sensitive goods and technologies to a Russian purchaser as an indirect sale, supply, or transfer of said goods. As a result, such transactions may necessitate authorization in accordance with the applicable regulations.<sup>40</sup>

Finally, in the realm of asset freeze measures, the EU has implemented an additional initiative that mandates Member States to designate a national authority by 31 October 2024. This authority will be responsible for identifying and tracing the funds and economic resources of individuals and entities subject to sanctions within their respective jurisdictions. The primary objective of this initiative is to proactively prevent and detect any actual or attempted violation or circumvention of the EU's restrictive measures.

## 3 THE NEW ANTI-CIRCUMVENTION RULES: WALKING THE THIN BLUE LINE BETWEEN 'SOFT' EXTRATERRITORIALITY, 'HARD' EXTRATERRITORIALITY AND SECONDARY SANCTIONS

In the Q&A text accompanying the adoption of the eleventh package, the Commission states clearly that EU sanctions do not apply on an extraterritorial level. 'This is a principle', the Commission declares, '[that] we have long stood by and will continue to stand by. We are not

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<sup>35</sup> Press Release, *Russia's war of Aggression Against Ukraine: EU Adopts 12th Package of Economic and Individual Sanctions* (18 Dec. 2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/12/18/russia-s-war-of-aggression-against-ukraine-eu-adopts-12th-package-of-economic-and-individual-sanctions/>.

<sup>36</sup> Council Regulation 2023/2878, *supra* n. 5. Art. 12(g) does not apply to contracts concluded before 19 Dec. 2023, until 20 Dec. 2024, or until their earlier expiration date. Further, partner countries listed in Annex VIII of Regulation no. 833 – currently USA, Japan, UK, South Korea, Australia, Canada, New Zealand, Norway, and Switzerland – are excluded from the scope of application.

<sup>37</sup> *See at*, [https://finance.ec.europa.eu/document/download/6eb8bd33-992d-4b9d-8e17-baffef83aa35\\_en?filename=faqs-sanctions-russia-software\\_en%2C.pdf](https://finance.ec.europa.eu/document/download/6eb8bd33-992d-4b9d-8e17-baffef83aa35_en?filename=faqs-sanctions-russia-software_en%2C.pdf). The response of contractual partners in third countries to the inclusion of such a far-reaching clause is yet to be observed. For a critical understanding of the Commission's proposed clarifications, *see* Gleiss Lutz, *Foreign Trade Law Update: 13th Package of EU Sanctions Against Russia and new Developments Following 12th Package* (26 Feb. 2024), <https://www.gleisslutz.com/en/news-events/know-how/foreign-trade-law-update-13th-package-eu-sanctions-against-russia-and-new-developments-following-12th-package>.

<sup>38</sup> Council Regulation 2023/2878, *supra* n. 5, Art. 1, para. 19. EU, EEA and Swiss citizens, temporary or permanent residents are not subject to this prohibition.

<sup>39</sup> *Ibid.*, Art. 1, para. 24, introducing a new Art. 5(r). As of 1 May 2024, EU entities that are Russian-owned will have to report every quarter on any transfer of funds out of the EU exceeding 100 000 EUR, in one or several operations. As of 1 Jul. 2024, EU credit and financial institutions will have to report every semester on transfers of funds out of the EU that they initiated for the aforementioned EU entities where their cumulative amount exceeds 100 000 EUR during that semester.

<sup>40</sup> *See at*, [https://finance.ec.europa.eu/system/files/2023-12/faqs-sanctions-russia-divestment\\_en.pdf](https://finance.ec.europa.eu/system/files/2023-12/faqs-sanctions-russia-divestment_en.pdf).

asking operators who are outside EU jurisdiction to comply with our sanctions'.<sup>41</sup>

The term 'extraterritorial sanctions' commonly refers to sanctions imposed outside a State's territory, often targeting individuals who are not nationals of that state. In this context, the concept of 'extraterritorial application' pertains to subjecting individuals, whether they are companies or physical persons, foreigners or nationals, to comply with obligations imposed by domestic law for actions conducted abroad.<sup>42</sup> It is of the utmost importance, when considering a state's practice, to assess whether these measures align with the framework of customary international law on jurisdiction.<sup>43</sup> If these measures fall within the boundaries established by international rules on the extraterritorial application of prescriptive jurisdiction, this level of extraterritoriality does not give rise to any issue of international responsibility. However, if these measures exceed these limits, they may be deemed unlawful, triggering questions of international responsibility for the sanctioning state's wrongful acts.<sup>44</sup> The 2018 *EU Guidelines on the implementation and evaluation of restrictive measures (sanctions)* captures this cogently:

EU restrictive measures should only apply in situations where links exist with the EU. Those situations ... cover the territory of the European Union, aircrafts or vessels of Member States, nationals of Member States, companies and other entities incorporated or constituted under Member States' law or any business done in whole or in part within the European Union.<sup>45</sup>

The EU Guidelines eventually go further, declaring that the EU:

will refrain from adopting legislative instruments having extra-territorial application in breach of international law. The EU has condemned the extra-territorial application of third country's legislation imposing restrictive measures which purports to regulate the activities of natural and legal persons under the jurisdiction of the Member States of the European Union, as being in violation of international law.<sup>46</sup>

The issue of jurisdiction and the scope of its application become further complicated by the implementation of 'secondary sanctions'. These measures specifically target individuals and entities from third countries that have no connection with the regulating state. The basis for imposing these sanctions lies in the argument that these individuals and entities engage in certain activities with the sanctioned states and individuals. By prohibiting third countries and their operators from conducting business as usual with the sanctioned state, secondary sanctions help address many of the gaps and loopholes that primary sanction regimes often possess.<sup>47</sup> Despite their potential effectiveness in achieving the goal of countering circumvention, secondary sanctions still give rise to significant divergence. Third States, including the EU, whose nationals and entities are targeted, view these coercive measures as a blatant violation of their sovereignty. This is due to the intrusion upon the exclusive territorial jurisdiction that each state can claim over its territory, as well as the limitation of the right to freely engage in external economic relations with other States.<sup>48</sup>

### 3.1 The first ten Packages of EU Sanctions Against Russia: A 'soft' Approach to Extraterritoriality

Both Regulation 269/2014 and Regulation 833/2014, the two legal instruments upon which the entire EU framework of sanctions against Russia is built upon, confirm the traditional EU anti-extraterritorial model. These regulations apply: (1) within the territory of the EU; (2) on board any aircraft or any vessel under the jurisdiction of a Member State; (3) to nationals of the Member States; (4) to any legal person, entity or body incorporated or constituted under the laws of a Member State; and (5) to any business done in whole or in part within the EU.<sup>49</sup>

However, this does not mean that EU sanctions under these regulations lack a certain degree of extraterritoriality. Both regulations indeed specify that the prohibition on EU operators engaging in certain transactions applies 'directly or

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<sup>41</sup> European Commission, Questions and Answers, *supra* n. 33.

<sup>42</sup> See Yann Kerbrat, *Unilateral/Extraterritorial Sanctions as a Challenge to the Theory of Jurisdiction*, in *Research Handbook on Unilateral and Extraterritorial Sanctions* 165–185 (Charlotte Beaucillon ed., Edward Elgar 2021).

<sup>43</sup> On extraterritoriality and the limits on jurisdiction in international customary law, *see* among many others, Cedric Ryngaert, *Jurisdiction in International Law* (OUP, 2d ed. 2015).

<sup>44</sup> See Susan Emmenegger, *Extraterritorial Economic Sanctions and their Foundation in International Law*, 33(3) *Ariz. J. Int'l & Comp. L.* 631–660 (2016); and Charlotte Beaucillon, *Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation*, in *Coercive Diplomacy*, *supra* n. 14, at 103–126.

<sup>45</sup> Council of the EU, General Secretariat, *EU Guidelines on the implementation and evaluation of restrictive measures (sanctions) – Update* (4 May 2018), Doc. 5664/18, para. 51.

<sup>46</sup> *Ibid.*, para. 52.

<sup>47</sup> Tom Ruys & Cedric Ryngaert, *Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, *Brit. Y.B. Int'l L.* 1–116 (2020), doi: 10.1093/bybil/braa007, who define secondary sanctions as 'force multipliers for primary sanctions'.

<sup>48</sup> *See* for instance, UNGA draft Resolution A/75/L.97 (2021), para. 2. For an introduction on the protests by almost all countries of the international community against secondary sanctions, *see* Patrick Terry, *Secondary Sanctions: Why the US Approach Is Unlawful and the EU's Response is Ineffective*, 17(9) *GTCJ* 370–379 (2022).

<sup>49</sup> *Council Regulation 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine* [2014] OJ L 78, Art. 17; and *Council Regulation (EU) No 833/2014*, *supra* n. 5, Art. 13.

indirectly'.<sup>50</sup> This suggests that transactions carried out through economic operators in third countries could fall within the scope of the Russian-related sanctions regime, even if these operators are not expressly mentioned.<sup>51</sup> Interestingly, the EU Commission's FAQs on Regulation 833/2014 point out that the prohibition on carrying out certain transactions does not apply to Russian subsidiaries of European companies because they are incorporated under Russian law and fall outside the scope of the measures. However, the Commission notes that EU parent companies are prohibited from using their Russian subsidiaries 'to circumvent the obligations that apply to the EU parent, for instance by delegating to them decisions which run counter the sanctions, or by approving such decisions by the Russian subsidiary'.<sup>52</sup> Similarly a non-EU company shipping goods directly from Russia to a non-EU country must comply with EU sanctions when importing products through the Union or conducting payments within the Union 'as it is entering the EU internal market'.<sup>53</sup>

The criteria for the extraterritorial enforcement of EU sanctions are here based on the nationality of natural or legal persons and a partial territorial connection to the EU territory. Although approached in quite broad terms – potentially invoking the discussed *control theory*<sup>54</sup> and *effects doctrine*<sup>55</sup> – the transactions at stake do have a link to the EU. Therefore, they fall within the accepted grounds for extraterritorial jurisdiction under international law. Academics refer to this as a 'soft' approach to extraterritoriality.<sup>56</sup>

### 3.2 The 11th and 12th Packages of Sanctions: Towards a more Robust (or 'hard') Approach to Extraterritoriality

When discussing the extent of the eleventh package of sanctions, the EU asserts that it does not require 'operators who are outside EU jurisdiction to comply with our sanctions'.<sup>57</sup> Nowhere in the eleventh and twelfth packages can one find a formal statement that the EU is authorized to

impose on a non-EU natural or legal person a sanction upon determining that said person has conducted or facilitated a transaction involving certain activities for or on behalf of any Russian listed person or entity.<sup>58</sup> However, the language used in the anti-circumvention provisions undeniably indicates that the EU perceives these new rules as a form of extraterritorial enforcement of its prohibitions on transactions by third-country individuals or entities with EU primary sanction targets.

This is evident in Council Decision 2023/1218, which introduces a new ground for listing individuals who 'otherwise significantly frustrate' EU sanctions.<sup>59</sup> The text of the Council decision explicitly covers actions 'by third country operators not bound by [EU sanctions]' that contribute to Russia's capacity to wage war, thereby 'undermining the purpose and effectiveness of EU sanctions'.<sup>60</sup> As previously mentioned, the Council specifically refers to cases where a third country operator's primary activity involves purchasing restricted goods in the EU and subsequently delivering them to Russia. Crucially, the EU's objective is to prohibit *third countries companies* from engaging in transactions *with listed persons that involve certain EU-sanctioned goods*, as these contribute to Russia's capacity to wage war.

On another level, we can consider the criteria outlined in Decision 2023/1218, which aim to deter vessels from entering ports and locks within the EU. These criteria have been intentionally designed to be broad enough to encompass vessels from third countries engaged in activities related to the transportation of Russian seaborne crude oil and petroleum products. Consequently, Decision 1218 prohibit access to 'all vessels, irrespective of their flag of registration, and to any ship-to-ship transfers carried out at any point during the voyage to a Member State's ports or locks'.<sup>61</sup>

These two provisions draw parallels to significant instances of extraterritorial sanctions implemented by

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<sup>50</sup> Council Regulation 269/2014, *supra* n. 49, Art. 2, para. 2; and Council Regulation 833/2014, *supra* n. 5, Art. 2, para. 1.

<sup>51</sup> See Regis Bismuth, *The New Frontiers of European Sanctions and the Grey Areas of International Law*, 5 *Revue Européenne du Droit* 8–12 (2023), doi: 10.3917/red.005.0008.

<sup>52</sup> Commission, Consolidated FAQs, *supra* n. 10, at 54.

<sup>53</sup> *Ibid.*, at 216.

<sup>54</sup> See Ryngaert, *supra* n. 43, at 110.

<sup>55</sup> According to the effects doctrine a state can exercise its jurisdiction asserted with respect to any conduct (even of foreign nationals occurring outside its territory) that has a substantial effect within its territory.

<sup>56</sup> Charlotte Beaucillon, *The European Union's Position and Practice with Regard to Unilateral and Extraterritorial Sanctions*, in *Research Handbook*, *supra* n. 42, 110–129.

<sup>57</sup> European Commission, Questions and Answers, *supra* n. 33.

<sup>58</sup> See contrary, with regard to the US practice of extraterritorial and secondary sanctions, Executive Ord. 13871, 84 FR 20761 (2019), which imposed sanctions with respect to the iron, steel, aluminium, and copper sectors of Iran. See also Countering America's Adversaries Through Sanctions Act–Related Sanctions (CAATSA), Public Law 115, 44, 2 Aug. 2017, Sec. 225 and Sec. 226, which provided that foreign persons and financial institutions face sanctions if the Secretary of the Treasury determines that they knowingly engage in significant transactions involving certain defence and energy-related activities or knowingly facilitate significant financial transactions on behalf of any Russian person added to OFAC's SDN List.

<sup>59</sup> Decision 2023/1218, *supra* n. 2, Art. 1.

<sup>60</sup> *Ibid.*, Recital 4. See also *supra* n. 22 and the reference to *Council Implementing Regulation (EU) 2024/753*.

<sup>61</sup> Decision 2023/1217, *supra* n. 2, Art. 1, para. 13.

the US against countries like Iran and Cuba.<sup>62</sup> Iranian sanctions prohibit, among others:

The re-exportation from a third country, directly or indirectly, by a person other than a United States person, of any goods, technology, or services that have been exported from the United States ... if undertaken with knowledge or reason to know that the re-exportation is intended specifically for Iran or the Government of Iran.<sup>63</sup>

As for the US sanctions against Cuba, they prohibit vessels which entered a port or place in Cuba to engage in trade of goods or services from loading or unloading 'any freight at any place in the United States, except pursuant to a license issued by the Secretary of State'.<sup>64</sup>

What is most relevant in this parallelism between the US and the EU is not that their sanction regimes contain similar extraterritorial measures, but rather that the jurisdictional nexus in both cases is based upon the *protective principle*.<sup>65</sup> Despite this, such an outcome might be surprising in the case of the EU, given that it has been traditionally outspoken in its criticism against the extensive extraterritoriality of US sanctions where a strong territorial or personal connection with the sanction's target is absent.<sup>66</sup>

Specifically, the jurisdictional nexus seems mainly established through the fact that the EU sees the effective implementation of these measures as a class of domestic interest so fundamental that it can be lawfully protected by extending the extraterritorial reach of EU prescriptive jurisdiction. According to the Commission's Q&A text:

when foreign operators partake in the circumvention of EU sanctions ... this can be of such nature as to undermine the objectives of EU sanctions. This can then

result in CFSP measures taken against them, such as a listing activating financial sanctions and, for natural persons, also a travel ban.<sup>67</sup>

Seen in this light – i.e., by taking into account not the situation that the rule was intended to govern but the reason for which the sanctions are imposed – the recent EU anti-circumvention rules not only may be reminiscent in some of their elements (such as, for instance, the new anti-circumvention tool or the 'No-Russia' contractual clause) of typically US secondary sanctions, but also raise another intriguing point. Notably, anti-evasion measures are not traditionally included among the recognized grounds of jurisdiction in international law, as scholars have observed.<sup>68</sup> Even the US has only sporadically relied on the anti-evasion (or anti-circumvention) argument within its sanctions practice, typically based on the protective principle.<sup>69</sup> Hence, the EU's declaration that any attempt to circumvent its sanctions, regardless of where it occurs, poses a substantial threat to its security and interests establishes a novel and distinctive *jurisdictional bound*. This illustrates the EU's decision to adopt a more robust (or 'hard') approach to extraterritoriality in the realm of sanctions.<sup>70</sup>

Finally, it is worth considering whether affected third states can retaliate against the EU, as they may view these new measures as exceeding the bounds permitted by international law. Nonetheless, these measures may fall within the realm of permissible collective countermeasures under Article 54 of ARSIWA. This is because their objective is to address the wrongful non-compliance of third states with collective obligations arising from a serious breach of *jus cogens* (or

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<sup>62</sup> The US official explanation on the protective principle is in *Restatement of the Law Fourth, The Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity* (American Law Institute, Washington 2017), § 412.

<sup>63</sup> Iranian Transactions and Sanctions Regulations, s. 560.205(a)(1).

<sup>64</sup> Cuban Democracy Act, US Code Title 22, Ch. 69 Foreign Relations and Intercourse, s. 6005(b)(1).

<sup>65</sup> According to the protective principle (or *compétence réelle*, or in rem) a state can lawfully assert jurisdiction over certain conduct outside its territory by persons not its nationals when such actions constitute a threat to the security of the state or against a limited class of other fundamental national interests of the state. That principle is widely accepted in criminal matters, thus allowing states to incriminate and punish activities that harm their vital interests. On the other hand, the main issue is the uncertainty about the crimes that could give rise to protective jurisdiction, and, in cases of unilateral sanctions, the necessity to demonstrate sufficient evidence to a direct threat to national security by the targeting state. For more on this, see Ryngaert, *supra* n. 43, at 114–119.

<sup>66</sup> *Council Regulation (EC) 2271/96 of 22 November 1996, Protecting Against the Effects of the Extra-Territorial Application of Legislation Adopted by a Third Country, and Actions Based Thereon or Resulting Therefrom* [1996] OJ L 309. The initial 1996 legislation was limited to US secondary sanctions regarding Cuba but, in response to the US quitting the JCPOA two decades later, the EU amended the Blocking Regulation to counter the US also in Iran, *Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018* [2018] OJ 2018 L 1991. See also Nathanael Tilhahun, *Resisting (US) Sanctions: A Comparison of Special Purpose Vehicles, Blocking Statutes and Countermeasures*, 17(9) GTCJ 380–388 (2022), doi: 10.54648/GTCJ2022053. As to the EU view that US extraterritorial sanctions are against international law, see COM(2021)32 final, *The European Economic and Financial System: Fostering Openness, Strength and Resilience* (19 Jan. 2021).

<sup>67</sup> European Commission, Questions and Answers, *supra* n. 33.

<sup>68</sup> Ruys & Ryngaert, *supra* n. 47, at 27.

<sup>69</sup> See for instance, Executive Ord. 13608, 3 C.F.R. § 13608 (2012), Prohibiting Certain Transactions With and Suspending Entry Into the United States of Foreign Sanctions Evaders. The US Department of the Treasury confirmed on its FAQ page that 'Executive Order 13608 expands Treasury's ability to address the behaviour of foreign persons determined to have violated or attempted to violate US sanctions'. See FAQ 192: Iran Sanctions, Executive Ord. 13608, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/192>. As for the Russia-related sanctions, see Executive Ord. 14024, 86 C.F.R. § 20249 (2021); and, in particular, US Department of Commerce, *Implementation of Additional Sanctions Against Russia and Belarus Under the Export Administration Regulations (EAR) and Refinements to Existing Controls*, 88 F.R. § 33422 (19 May 2023).

<sup>70</sup> Interestingly, this use of anti-evasion as a jurisdictional ground is not new in the EU experience, as it already appears in the field of financial regulation by requiring that foreign hedge funds wishing to offer products within the EU comply with European rules on liquidity, capitalization, conflicts of interests and risk management. See Joanne Scott, *The New EU 'Extraterritoriality'*, 51(5) CML Rev. 1343–1380 (2014), doi: 10.54648/COLA2014110.



peremptory) norms by Russia.<sup>71</sup> While this issue goes beyond the scope of this article, it highlights the possibility of such retaliatory actions and the legal justifications behind them.

#### 4 CONCLUSIONS

This article has outlined how the EU, through the adoption of its eleventh and twelfth packages of sanctions against Russia, has joined the ‘small circle’ of States whose unilateral sanctions can have an extensive extraterritorial reach that surpasses the accepted cases of extraterritoriality under public international law. However, while the imposition of these measures based on broad jurisdictional claims may expand the EU’s power, it also exacerbates power imbalances and undermines the protections offered by national sovereignty and the principle of non-intervention in the domestic affairs of other states.<sup>72</sup> Perhaps due to these concerns, the EU has accompanied the adoption of these new sanctions with official statements assuring that they do not have an extraterritorial application, and that operators outside the EU’s jurisdiction are not expected to comply with them. Similarly, the anti-circumvention tool has been designed as ‘an exception and last resort measure’, subject to stringent

procedural and substantive requirements. As a result, it primarily serves as a deterrent rather than a practical manifestation of coercive power.

The EU’s concerns can be understood for at least three reasons. Firstly, the EU has traditionally opposed the extensive extraterritoriality of US sanctions based on the *protective principle*, arguing they encroach upon its sovereignty and independence. Secondly, the EU is well aware that it lacks the same leverage on third countries as the US, with its access to the US financial system and the weaponization of the dollar, which remains crucial for numerous financial institutions worldwide. Additionally, the EU recognizes that certain foreign countries, such as China,<sup>73</sup> could respond strictly and firmly to any attempt to introduce extraterritorial sanctions under EU law, and that such retaliations could have severe consequences for the EU’s trade balance and, by extension, the overall EU economy and the well-being of its population. Nevertheless, the EU’s decision to impose measures with explicit extraterritorial application, despite previously denouncing such actions when undertaken by the US, demonstrates that the EU is now prepared to confront this geo-political challenge, which is ultimately a challenge for the defence of the EU’s security interests and the maintenance of international peace and security.

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<sup>71</sup> See Stefano Silingardi, *Secondary Sanctions, State Responsibility and Grave Breaches of jus cogens norms*, in *The Cambridge Handbook of Secondary Sanctions and International Law* (Tom Ruys, Cedric Ryngaert & Felipe Rodriguez Silvestre eds, CUP 2024 forthcoming).

<sup>72</sup> See Nico Krisch, *Jurisdictional Unbound: (Extra)territorial Regulations as Global Governance*, 33(2) EJIL 481–514, at 505 (2022), doi: 10.1093/ejil/chac028.

<sup>73</sup> See Guy Chazan, *China Vows to Retaliate Against EU Sanctions on Its Companies*, Financial Times (9 May 2023), <https://www.ft.com/content/7b482ea6-49ff-4212-8475-87e74a16f8c5>.